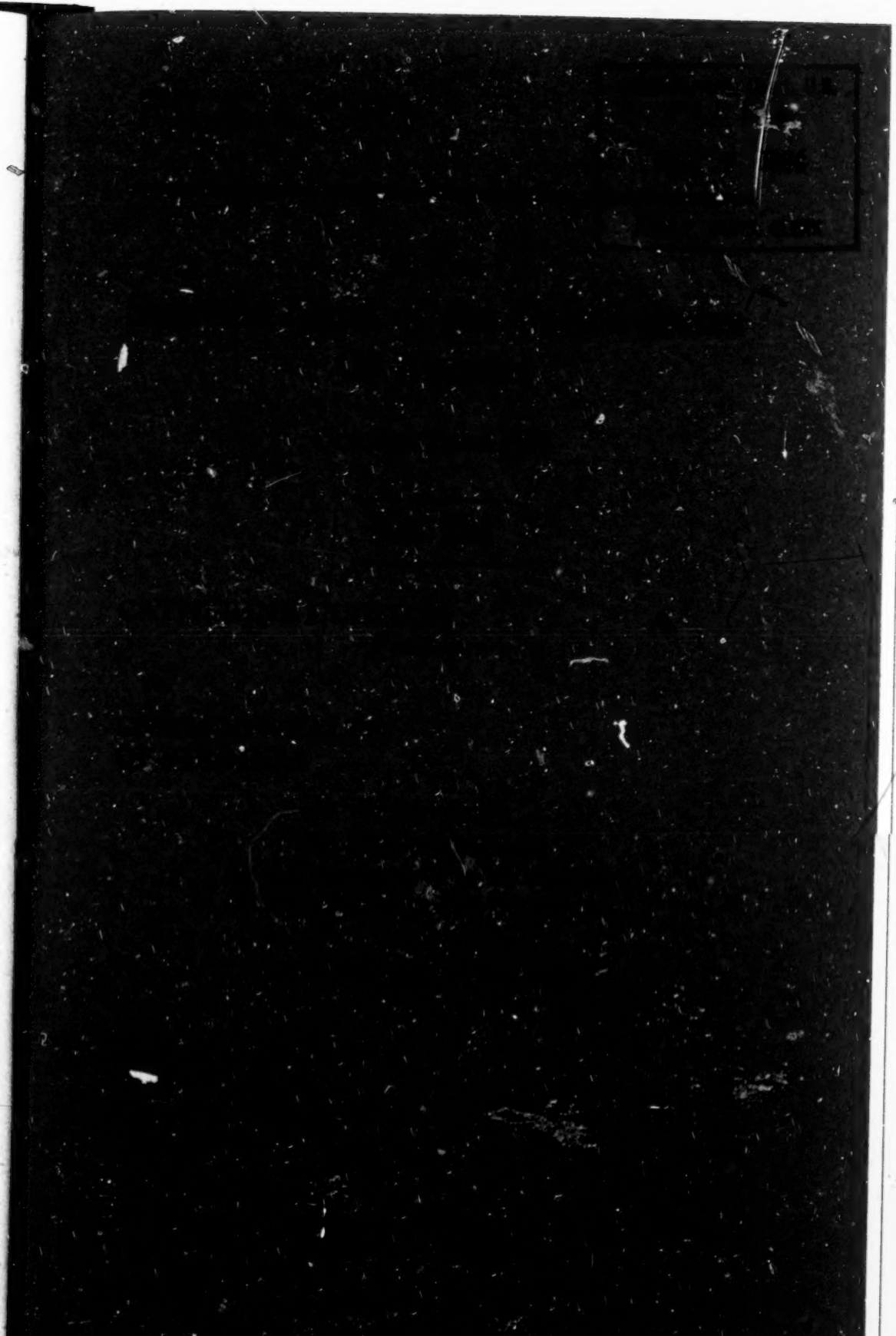
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IN THE

Supreme Court of the United States Of America

OCTOBER TERM 1963

No. 294

CATHERINE CLINTON
Petitioner

vs.

COMMONWEALTH
OF VIRGINIA

On Writ of Certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

There were no reports of the trial court's decisions.

The Decision of the Supreme Court of Appeals for the Commonwealth of Virginia has been reported as *Clinton* vs. *Commonwealth,* 204 Va. 275.

JURISDICTION

The judgment of the Supreme Court of Appeals for the Commonwealth of Virginia was entered on April 22, 1963; there were no petitions for rehearing and no orders granting an extension of time in which to petition for a Writ of Certiorari. The petition for a Writ of Certiorari was filed on July 19, 1963, and granted on December 9, 1963. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A., Section 1257 (3).

QUESTION PRESENTED

Whether evidence obtained by City Police Officers through the use of a spiked microphone stuck into a partywall separating adjoining efficiency apartments, which enabled the Police Officers to overhear everything said in the contiguous private efficiency apartment occupied by petitioner, is admissable against the the petitioner in a State Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth Amendment, Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment, Constitution of the United States:

"No person shall be heard to answer for capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

A two count indictment was returned by the Grand Jurors at the December, 1961, term of the Corporation Court of the City of Norfolk, Virginia. The petitioner was charged with the violation of Section 18.1-208 of the Code of Virginia 1950 as amended, knowingly receiving money from the earnings of a prostitute, not being for consideration deemed good or valuable in law, and of violation of Section 18.1-205 of the Code of Virginia 1950, as amended, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute. (R. 3, 4).

Petitioner was first tried in the Corporation Court of the City of Norfolk, Virginia, on the 26th day of February, 1962, at which time the jury was unable to agree upon a verdict, whereupon they were discharged.

(R. 4, 5). Petitioner was again tried in said Court on 22 March 1962, at which time the jury found the petitioner guilty as charged and fixed her punishment at five (5) years imprisonment and a fine of Five Hundred Dollars. ($500.00). (R. 5, 6).

During retrial, City Police Officer, Earl H. Beach, testified that beginning October 21, 1961, he was assigned to keep surveillance of Apartment 103 which apartment had been rented by petitioner and her husband under another name. Police Officer Beach kept the apartment under surveillance from the street on 21 October 1961, and on 23 October 1961, he began a surveillance from the adjoining apartment, Apartment 102. (R. 28). In response to a question as to how he could hear from the next apartment, Police Officer Beach testified as follows at R. 31, 32:

> A. Yes, Sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sound so that you could hear it in the other room.
>
> Mr. Reid: Spiked Device?
>
> A. Yes, Sir: small device.
>
> Mr. Reid: Object to anything he heard with the spiked device and object to his testimony in its entirety unless he could tell what portions that he could hear to with his ear to the medicine cabinet.
>
> Mr. Whitehurst: Your honor, this is also in the next door apartment; listening to what was going

on in the apartment that this defendant forged a name. I suggest this is material for the jury to hear. What he can hear, whether he used a device or had a hearing aid or even put on glasses, this gets to the truth and should come in.

Mr. Reid: On the basis of the spiked device, Your Honor, it is an unreasonable seizure under the 4th Amendment of the Constitution. As such I submit to the Court, it is not admissible. Secondly, the Police Officer testified that part of the conversation he could hear through the medicine cabinet.

Unless he can qualify as to what portion of that he heard through that, I submit his testimony should be stricken en toto.

The Court: Overruled. Exception noted.

Mr. Reid: Save the point, if Your Honor please.

On cross examination, Police Officer Beach testified further as follows, R. 37.

Q. "This spike, was it driven in the wall?

A. It wasn't driven in.

Q. Stuck in the wall?

A. Yes, Sir.

Q. In what portion of the apartment was that?

A. The whole apartment was just one-room efficiency. It would be in the wall that was separating the two apartments."

At the conclusion of trial, trial counsel for petitioner again moved that the evidence of Officer Beach be stricken on the ground, among others, that it was the result of an unlawful search and seizure by reason of the spiked electronic listening device. (R. 39).

Police Officer Beach continued his surveillance of the apartment rented by petitioner by means of the spiked device on 23, 24 and 25 October, 1961 and related into evidence the conversations he thereby heard. (R. 33, 34 and 35). The surveillance was terminated by a raiding party breaking into the apartment rented by petitioner and there was no evidence of any search warrant. (R. 38).

Upon grant of a Writ of Error and Supersedeas, the Supreme Court of Appeals of Virginia affirmed the conviction of petitioner. The Court distinguished *Silverman* vs. *United States,* 365, U. S. 505, 81 S Ct. 679, 5 L. Ed. 2d 734, on the grounds that the record showed that there was only a small penetration on the wall by the spiked device and that the record does not show, "That the eavesdropping was accomplished through 'an unauthorized physical penetration into the premises' occupied by defendant." (R. 47).

ARGUMENT

I. Evidence obtained by means of a spike mike violates the Fourth Amendment under existing decisions of this Court.

The Fourth Amendment prevents only "unreasonable" searches and seizures. What constitutes an unreasonable search and seizure is a vexing problem to bench and bar under present day circumstances. To our forefathers when the Fourth Amendment was adopted, the problem was relatively simple. Breaking and entering by force and the seizure of papers along with the hated general search warrant was the nature of the evil in those days. It has been suggested that this was one of the main causes of the American Revolution. *see John Adams, Works,* Vol. II, p. 524. When the problems caused by electronic surveillance first arose, this principle that there must be an actual physical trespass to constitute an unreasonable electronic search became engrafted over strong dissent in the law. *Olmstead* v. *United States,* 277 U. S. 438. In *Olmstead* government agents had the telephone lines of the suspect's office tapped and thus listened and made stenographic notes of all telephone conversations. However, as there was no actual physical trespass into the suspect's office, it was held that tapping the telephone lines outside of the suspect's office and listening to his voice which the suspect intended to send over the wires was not an unconstitutional search and seizure. *Olmstead* v. *United States, supra.* This type excess of the law enforcers zeal therefore was required to be curbed by federal legislation.

Following the principle of the need of an actual trespass, it was held that merely laying a detectaphone against an office wall and hearing on the outside of the office words spoken within the office not accompanied by a trespass into the office, was not an unrea-

sonable search and seizure. *Goldman* v. *United States,* 316 U. S. 129. When a friend wired as a walking radio, literally with an antenna up his sleeve, walked into the business place of a suspect and caused the suspect to make admissions which were broadcast and heard by an agent waiting with a radio receiver, it was held not to be an unreasonable search and seizure as there was no trespass. *OnLee* v. *United States,* 343 U. S. 747. Similarly, when an agent who had previously been offered a bribe returned to the office of the briber and recorded subsequent conversations by means of a hidden recorder, it was held not to be an unreasonable search and seizure as, again, there was no trespass. *Lopez* v. *United States,* 373 U. S. 427.

A problem arose when a spike mike with a spike nearly a foot long was used by insertion for about seven inches under the floorboard of an adjoining row house which spike made contact with the heating duct of the suspects' house thus making the heating system an enlargement or giant sounding board for the spike mike. This Court met this problem by holding that this electronic appropriation of the heating system constituted an actual physical trespass and this was an unreasonable search and seizure. *Silverman* v. *United States,* 365 U. S. 505. The Court was careful to say at *Silverman* v. *United States,* supra, p. 511.

> "Here by contrast, the officers overheard the petitioners' conversation only by usurping part of the petitioners' house or office — a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was

effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls.* Inherent Fourth Amendment rights are not inevitably measured in terms of ancient niceties of tort or real property law." (Emphasis added)

And at p. 512:

"But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." (Emphasis added)

It is submitted that the "actual intrusion" found in *Silverman* to qualify under the doctrine of a needed trespass was nothing more or less than an electronic intrusion. I further submit that this electronic intrusion in *Silverman* of the spike mike, while not an actual physical intrusion, was in effect a more gross intrusion than that which could have been effected by the physical trespass of an officer. This is the situation in the instant case. Here we have the admitted use of a spike mike stuck in the party wall of contiguous rooms. The significance of the use of a spike mike is set forth in the section on "Tools" in Dash, Knowlton and Schwartz's *The Eavesdroppers* at p. 31.

"Where access to the room is impossible, 'contact mikes' are available which can pick up sounds

through a common wall. The microphone is fastened to the wall with a spike which is driven into the common stud between the rooms, that is, the common column to which the lath or wallboard is fastened. Obviously, there are a few cases where common studding is not used, and in such cases, this type of eavesdropping is impossible."

Admittedly, the intrusion into the apartment occupied by the accused here was not as gross as that in *Silverman.* However, the actual electronic intrusion here was, I submit, as offensive to the Fourth Amendment as was that in Silverman.

To hold that the electronic intrusion of the spike mike in the instant case was a real and actual intrusion within the *Silverman* decision does not require a reversal of nor is it in conflict with *Goldman* v. *United States,* 316 U. S. 129. The distinction is that in *Goldman* a detectaphone which merely amplifies sounds which come through a wall was used while in the instant case, as in *Silverman,* there was used a spike mike designed to actually intrude electronically into the home or office and appropriate sounds from within this constitutionally protected area and project them from within to the listener on the outside. This may appear to be a fine distinction, but it offers a clear test. This is clearly set forth by Justice Burton in his dissent in *OnLee* v. *United States,* 343 U. S. 747, at 767:

"While this test draws a narrow line between what is admissible and what is not, it is a clearly

ascertainable line. It is determined by where the "effects" are seized or, as here, where the words are picked up."

I submit that this test, clear and easily understood by law enforcement officers, should be accepted by the Court. The test should be that any electronic device designed to electronically penetrate into and overhear words spoken within the house or office constitute an unreasonable search and seizure under the Fourth Amendment while electronic devices designed merely to magnify sounds which have come through walls and which pick up and magnify such sounds only after the sounds have come through the walls of the private home or office are reasonable searches. Tested by this standard, the instant case results in an unreasonable search and seizure as the reasonableness of a state search and seizure is to be judged by Fourth Amendment standards. *Ker* v. *California,* 374 U. S. 23. It is further submitted that the introduction of the evidence so obtained was prejudicial as there "is a reasonable possibility that the evidence complained of might have contributed to the conviction. *Fahy* v. *Connecticut,* 11 L. Ed. 2d 171, 173.

II. The Fourth and Fifth Amendments create a right of privacy rendering unconstitutional searches and seizures utilizing a spike mike.

If the Court finds that the instant case is not within the principle of *Silverman* v. *United States, supra,* but is controlled by *Goldman* v. *United States, supra,*

it is submitted that *Goldman* and the cases controlling and determining its decision should be reviewed as to their soundness in relation to the Fourth and Fifth Amendments.

The Fourth and Fifth Amendments met evils primary in the minds of the drafters of the Constitution. These evils were searches under general warrants and writs of assistance. see *Tudor,* James Otis, p. 66. Thus the Fourth and Fifth Amendments have a dual purpose—protection of the privacy of an individual, his right to be let alone, and protection of the individual against compulsory production of evidence to be used against him. *Davis* v. *United States,* 328 U. S. 582, 587. Or expressed slightly differently, the Fourth and Fifth Amendments intertwine and express "supplementary phases of the same constitutional purpose to maintain inviolate large areas of personal privacy." *Feldman* v. *United States,* 322 U. S. 487, 489-490. This right of privacy is also expressed in the old cliche "A man's home is his castle." This connotes that a man has the right to retreat to his home and there be free from unannounced governmental intrusions. see *Ker* v. *United States,* 374 U. S. 23, 51 (dissent).

This right of privacy has long been established in our law. This right was lucidly expressed in *Boyd* v. *United States,* 116 U. S. 616, 630.

> "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty

and private property, when that right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence of a crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

The issue in *Boyd* was the constitutionality of a provision in the customs laws in a forfeiture situation requiring an individual to produce the invoice or to be conclusively deemed to have admitted the allegations in the affidavit requesting it. This did not present the conventional or traditional picture of a forcible entry into a man's home prior to a search and seizure. Yet, the Court held in *Boyd* that this required production of the invoice or the alternative admission of allegations in the affidavit requesting it was in violation of the Fourth and Fifth Amendments. Certainly, there is no actual physical trespass when a friendly visitor surreptitiously removes a paper from a desk, yet evidence so obtained was held inadmissible in *Gouled* v. *United States,* 255 U. S. 298. Again, the Court must have been looking at the underlying principle of the Fourth Amendment to hold as it did in *Ex parte Jackson,* 96 U. S. 727, 733 that its protection extended to a letter in the mails.

Thus, the decision in *Olmstead* v. *United States,* 277 U. S. 438, holding that evidence obtained by wiretapping did not violate the Fourth and Fifth Amendments brought forth a vigorous dissent by Justice Brandeis in which he said at pages 478-479

> "The protection guaranteed by the Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding of facts ascertained by such intrusion must be deemed a violation of the Fifth."

The Court is now urged to accept the dissent in *Olmstead* v. *United States, supra,* reverse that decision and to reverse the decisions it controls including *Goldman* v. *United States,* 316 U. S. 129. see *Lopez* v. *United States,* 373 U. S. 427, 456 (dissent). It is submitted that upon accepting as correct the interpretation

of the Fourth and Fifth Amendments as set forth in the discent in *Olmstead,* then the Court will find that the use of the spike mike in the instant case and the entry into evidence of the evidence so obtained was in violation of these Amendments.

CONCLUSION

For the foregoing reasons, it is submitted that this Court should hold that the use of a spike mike and admission into evidence of information so obtained violates the Fourth and Fifth Amendments requiring reversal of the verdict of guilty, and remand this case for new trial.

Respectfully submitted,

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